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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CITY OF SANTA FE SPRINGS, Plaintiff and Respondent, v. FOXZ CORPORATION et al., Defendants and Appellants.	B206517 (Los Angeles County Super. Ct. No. BC370347)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael C. Solner, Judge. Affirmed.

Roger Jon Diamond and Peter B. Rustin for Defendants and Appellants.

Meyers, Nave, Riback, Silver & Wilson, Deborah J. Fox and Gregory J. Newmark for Plaintiff and Respondent.

Spicy, an adult entertainment business featuring nude female live performances, appeals from a judgment granting the City of Santa Fe Springs a permanent injunction that enjoined Spicy from continuing to operate its adult entertainment business in an area not zoned for adult entertainment. Spicy contends the applicable zoning ordinance was unconstitutional because it (1) did not provide for adequate alternative sites for adult businesses, (2) was not adopted in reliance on studies showing its purpose was to combat adverse secondary effects associated with adult entertainment, and (3) was arbitrary and irrational by not zoning for adult entertainment in a heavy manufacturing zone where Spicy conducted its business, which zone allegedly involved fewer sensitive uses than the area actually zoned for such businesses. We affirm.

FACTUAL BACKGROUND

The population of respondent City of Santa Fe Springs (City) consists of approximately 18,000 residents and 75,000 daytime employees. It covers nearly nine square miles.

The City adopted its first ordinance regulating adult businesses in 1979. The ordinance has been amended several times but has consistently required adult businesses to locate in the C-4 commercial zone. Ordinance No. 695, the operative ordinance during the events in this case, prohibited an adult business within 500 feet of any residential area, church, school, park, or public or recreational facility used by children, or within 1,000 feet of another adult business.[1]

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[1] Ordinance No. 695, adopted in 1986, provided in part that "Adult businesses shall comply with the following criteria and conditions:

"1. Adult business uses shall only be located in the C-4 zone.

"2. Adult business uses shall not be located in any of the following locations:

"a. Within 500 feet of any property zoned for residential land use.

"b. Within 500 feet of any property upon which is located a church w[hich] conducts religious education classes for minors; or a school primarily attended by minors; or a park, recreational facility or other public facility which is utilized by minors.

"c. Within 1,000 feet of any other adult business use."

Since 1985 the City's only adult business has been the Holiday Gentlemen's Club which provides topless adult live entertainment. Because the Club serves alcoholic beverages its patronage is legally limited to persons over the age of 21.

Appellant Edwin Kwong is the president of appellant Foxz Corporation, doing business as Spicy Gentlemen's Club. In the summer of 2005 Kwong visited the City looking for an available site to operate a cabaret featuring live female nude entertainment. During a visit to the City hall, he obtained a handout regarding adult businesses, and a copy of the zoning ordinance pertaining to adult businesses from which he learned that adult businesses were only authorized in the C-4 commercial zone.

According to Kwong, the sites in the C-4 zone that he considered most suitable were then occupied. On September 1, 2005 Kwong entered into a lease for 12215 East Slauson Avenue, located in the M-2 zone, and formerly used as a restaurant. At the time he entered into the lease, Kwong knew that M-2 was not zoned for adult businesses.

In early 2006 Kwong applied for various City permits to renovate and modify the property. In his applications Kwong represented that his intended use of the premises was a Mediterranean restaurant to be named Spicy Restaurant. He did not disclose that he intended to provide adult entertainment at the premises. Likewise, the architectural drawings and plans he submitted to the City stated the proposed business was a Mediterranean restaurant.

A June 2006 City inspection of the property noted that the improvements to the building were consistent with the approved construction plans for a restaurant. A follow-up inspection in July, however, revealed that Spicy's interior had been transformed into

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The City later adopted by urgency measure Ordinance No. 979 in December 2006 and its permanent equivalent, Ordinance No. 978, effective February 2007, to eliminate churches as sensitive uses for purposes of determining proper locations for adult businesses. These ordinances also specified how distances were to be measured between adult businesses and sensitive uses and each other and provided in part: "The distance between the adult use and the [sensitive use] shall be measured from the closest exterior wall of the adult use and the nearest property line [of the sensitive use], along a straight line extended between the two (2) points, without regard to intervening structures[.]"

an adult cabaret. The dining area had been removed and installed in its place was a stage with a brass pole, private party rooms, and semi-private lap dance booths. The City issued Spicy a notice of violation of building and safety code requirements. In the notice, the City also reminded Spicy that adult businesses were only allowed in the C-4 zone. Spicy corrected the noted building violations, the City gave Spicy a final sign-off on the building project, and on July 17, 2006 Spicy opened, not as a restaurant, but as an adult cabaret featuring totally nude female erotic dancers. Because Spicy did not serve alcoholic beverages it was legally permitted to (1) admit customers ages 18 to 20 as well as those over 21 years old, (2) provide totally nude dancing, and (3) avoid the additional licensing requirements and oversight by the Department of Alcohol Beverage Control.

In August 2006 inside the premises a patron fired shots striking an employee three times. The employee suffered life threatening injuries. In March 2007 two brothers were involved in a robbery and knife attack outside Spicy.

In April 2007 vice officers from the Los Angeles Sheriff's Department Major Crimes Bureau conducted an undercover investigation of Spicy and an officer testified at trial to activities he witnessed that the City believed constituted a nuisance.

On two different occasions, the City issued orders for Spicy to cease and desist its adult business, to no effect.

In May 2007 the City filed a complaint against Spicy seeking a preliminary injunction to enjoin Spicy's operation on the ground that Spicy was an adult business operating in the industrial M-2 zone in violation of the City's zoning ordinance which limits adult businesses to the C-4 zone. The City's complaint also sought to abate Spicy's business as a public nuisance, claiming Spicy's business had caused "numerous severe adverse effects on the surrounding community, including increases in violent crime."[2]

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[2] Based on the crimes discussed above, and the officers' undercover investigation, the City requested the court to enjoin Spicy from continuing its business on the additional ground that it constituted a public nuisance. Because the trial court rejected this ground as a basis for the

The trial court issued an injunction enjoining Spicy's operation. This court granted a temporary stay, and then a writ of supercedeas, directing the superior court to stay its order granting a preliminary injunction, and directing that trial of the matter should proceed as scheduled or as soon thereafter as possible. (*City of Santa Fe Springs v. Foxz Corporation* (July 9, 2007, B200200).)

At trial, Paul Ashworth testified as the City's principal witness. He began working for the City in 1981 as a planning technician in zoning enforcement and currently held the position of assistant director of planning and development. In 1985 Ashworth was personally involved in issuing a conditional use permit to the Holiday Gentlemen's Club. The distance between the exterior wall of the Club to the nearest residentially zoned area was approximately 495 feet, five feet short of the distance required by the ordinance. Nonetheless, the City's planning and development department considered the Club to be in substantial compliance with the ordinance and recommended approval of the Club's request for a conditional use permit for its topless bar. The City adopted the planning staff's recommendation and issued a conditional use permit to the Club.

In the decades since the granting of that permit, Ashworth only recalled six inquires from any person or entity seeking to open an adult business in the City and in the past five years the City had received no applications to open an adult business.

Ashworth testified that in the summer of 2005, when Kwong began his search for an adult business location, 18 sites were available for such businesses within the C-4 zone. He identified available locations as follows:

In map one area he identified a property on Rosecrans Avenue now known as the Morrison Building. In Ashworth's opinion, at the time Kwong was looking for a site, the property was located more than 500 feet from any sensitive uses. In particular, it was more than 500 feet from two store-front churches located in a shopping center that

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injunction, and the City did not appeal from that denial, we do not further discuss the facts related to whether or not the business constituted a nuisance.

provided education for children. The building was destroyed by fire in 2004, demolished in 2005, and in 2006 a new 13,000 square feet structure had been erected in its place. Thus, the site was available at all relevant times for an adult business, and, Ashworth opined, that because of its large size, the Morrison building could accommodate multiple tenants, representing in his view, two of the potential 18 available sites for an adult business.

Ashworth testified that he measured the distances between the potential adult business sites and the churches, the way "the city has always measured the buffer area from the wall of the particular establishment, in this case it would have been the exterior wall of the two churches[,] extending then outward 500 feet for the buffer area." Ashworth explained that he employed the same technique in 1985 when measuring the buffer zone for the Holiday Gentlemen's Club, and had employed the identical method of measurement throughout his 26-year employment with the City's planning and development department, including in his responses to inquiries regarding potential sites for an adult business.

The City's existing adult business, the Holiday Gentlemen's Club, is located in map two area. Although Ashworth stated that the Holiday Gentlemen's Club was available as a potential site, the City did not count this location as one of the 18 available commercial sites for an adult business.

Map three area encompassed the Gateway Plaza Shopping Center, a bowling alley/restaurant, and a Spires Restaurant. This part of the C-4 zone is located near the intersection of Carmentia and Telegraph Roads. Map three area had approximately 100,000 square feet of available space in the general commercial market, and, according to Ashworth, provided 16 potential sites for an adult business.[3] In performing his

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[3] Under the 2006-2007 ordinances excluding churches as sensitive uses, Ashworth calculated that there were approximately 50 sites available for adult uses in the C-4 commercial zone, representing in excess of 10 acres of available space.

calculations, Ashworth excluded sites from the Gateway Plaza Shopping Center then occupied by the large anchor stores Target, Marshalls, Gigante Market and Wal-Mart, because each of these tenants held long-term leases, and for this reason could not be considered to be reasonably available in the commercial market. Ashworth included the other sites within the shopping complex because these tenants had shorter leases (expiring in 2008, 2010, or 2012), and also because these leases were assumable and permitted subleases. Ashworth testified that some of these units could be joined or reconfigured to accommodate 14 adult businesses.

Spires Restaurant is located in map three area at the northeast corner of Telegraph Road and Carmenita Road adjacent to the shopping center. The restaurant's lease terminated on December 31, 2007 and the tenant opted not to renew the lease. The Premier Lanes Bowling Alley and restaurant are also adjacent to the Gateway Shopping Center, east of Painter Avenue and near Telegraph Road. The restaurant, Senor Baja, opened in 2005 as a separate facility from the bowling alley.

Based on this evidence Ashworth concluded that 16 adult business sites were available within the map three commercial zone: Fourteen sites within the Gateway Shopping Center, one at the Spires Restaurant and one at the combined bowling alley/restaurant site.

Stephen Pleasant testified on Spicy's behalf as an expert in land use and zoning. In his opinion, none of the sites identified by the City was reasonably available for an adult business. Pleasant testified that the Morrison Building was not an available site for an adult use because, in his opinion, it was within the buffer zone of a church. In making this determination, Pleasant measured 500 feet from the property line of the shopping complex in which the store-front churches were located, and not from the edge of the church property as the City had measured, because, according to Pleasant, his was the generally accepted method of measurement used by other municipalities. Pleasant also opined that the Morrison Building site contained too few parking spaces which, in his view, eliminated it as an appropriate site for an adult business.

Regarding map two area, Pleasant testified that the Holiday Gentlemen's Club was within the restricted buffer zone, because it was only 495 feet, not 500 feet, from a residential area. In his experience, even a five-foot violation could disqualify a site for an adult use if the municipality chose to strictly enforce its adult business ordinance.

In reviewing map three area, Pleasant testified that by measuring from the property line of the shopping center complex, the sites now occupied by the bowling alley, the Senor Baja restaurant, and the Spires Restaurant were all disqualified because they were within 500 feet of a church located within the shopping center complex. With regard to reconfiguring the tenant spaces within the shopping center itself, Pleasant testified that he had never before heard of a city justifying its zoning ordinance by suggesting the reconfiguration or partitioning of commercial sites, and for this reason dismissed any part of the shopping center as an available site within the C-4 zone.

The court issued its ruling in December 2007 finding that the City's ordinance was constitutional because it was supported by adequate studies regarding secondary effects of adult businesses on the community, and allowed for adequate alternative sites in the area zoned for adult uses. Accordingly, the court permanently enjoined Spicy from operating the adult business in the M-2 zone, its current location. On the other hand, the court concluded that the evidence was inadequate to find that Spicy constituted a public nuisance. Thereafter, at Spicy's request, the court issued a statement of decision, in which it detailed its findings of fact and conclusions of law.[4] The court issued its judgment permanently enjoining Spicy from operating an adult business in the M-2 zone on March 12, 2008, but stayed its effect until April 14, 2008, to give Spicy the opportunity to seek a writ of supersedeas. Spicy again requested that we issue a writ of supercedeas. We denied the request and this appeal followed.

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[4] Although this case involved only the second adult business seeking to operate in the City since 1985, the court found in its findings of fact that under the pre-2006 ordinance four adult businesses could have operated simultaneously in the City without violating the 1,000 feet separation requirement.

DISCUSSION

Spicy contends the City's pre-2006 ordinance regulating adult businesses was unconstitutional because it (1) did not provide an adequate number of locations within the area zoned for adult businesses, (2) was adopted without considering studies demonstrating a need to address adverse secondary effects of the operation of adult businesses, and (3) was arbitrary and irrational because it permitted adult businesses in the commercial zone but prohibited the same businesses in its industrial zone, Spicy's location, where allegedly there were far fewer sensitive uses.

I. STANDARD OF REVIEW

A trial court's findings of fact are reviewed for substantial evidence or clear error while its conclusions of law are reviewed de novo. (*Diamond v. City of Taft* (9th Cir. 2000) 215 F.3d 1052, 1055; *Lim v. City of Long Beach* (9th Cir. 2000) 217 F.3d 1050, 1054.) Mixed questions of law and fact are also reviewed de novo. (*Ibid*.; *Walnut Properties, Inc. v. City of Whittier* (9th Cir. 1988) 861 F.2d 1102, 1108.) A mixed question of law and fact exists when there is no dispute as to the facts, the rule of law is undisputed, and the question is whether the facts satisfy the legal rule. (*Diamond v. City of Taft, supra*, 215 F.3d at p. 1055; *Lim v. City of Long Beach, supra*, 217 F.3d at p. 1054.)

II. CRITERIA FOR A VALID TIME, PLACE AND MANNER ORDINANCE REGULATING SPEECH

In *Young v. American Mini Theaters, Inc*. (1976) 427 U.S. 50, the Court could not agree on a single rationale for its decision, but held that Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments. (*Id*. at pp. 72-73.) The Court held that the zoning ordinance (1) did not entirely ban adult businesses, (2) was content neutral, (3) was thus properly analyzed as a form of time, place, and manner regulation, and (4) under this test passed constitutional muster. (*Id*. at p. 63 & fn. 18.)

Ten years later the Court again addressed the validity of zoning ordinances regulating adult businesses in *City of Renton v. Playtime Theaters, Inc*. (1986) 475 U.S. 41. Renton sought to regulate adult motion picture theaters by prohibiting their location within 1,000 feet of any residential zone, single or multiple family dwelling, church, park or school. (*Id*. at pp. 44-45.) Unlike the ordinance in *Young*, which both limited proximity to sensitive uses and dispersed adult businesses, Renton's zoning ordinance had the effect of concentrating locations for adult theaters. (*Id*. at p. 52.) But similar to the ordinance in *Young*, it did not ban adult businesses altogether. (*Id*. at p. 46) The Court thus analyzed the zoning ordinance as a form of time, place, and manner regulation, which regulations, the Court held, are "acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." (*Id.* at p. 47.)

The Court found the ordinance content neutral because it was aimed, not at the adult films themselves, "but rather at the *secondary effects* of such theaters on the surrounding community." (*City of Renton v. Playtime Theaters, Inc., supra*, 475 U.S. at p. 47.) The Court observed that while the First Amendment protects sexually explicit communication, "'[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate[.]'" (*Id*. at p. 49, fn. 2.) The ordinance by its terms was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserve[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life" (*id*. at p. 48), and for these reasons satisfied the requirement that it further a substantial interest. The Court noted "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" (*Id*. at p. 50.)

The Renton ordinance also allowed for sufficient alternative avenues of communication because it left "some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites" consisting of "'[a]mple, accessible real estate,' including 'acreage in all stages of development from raw land to developed,

industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads.'" (*City of Renton v. Playtime Theaters, Inc., supra*, 475 U.S. at p. 53.) The Court's conclusion that the ordinance permitted for ample alternative sites was unaffected by the theater's concerns that "'practically none'" of the undeveloped land was for sale or lease, or that "'commercially viable'" sites for adult theaters were already occupied by existing businesses. (*Id*. at p. 53.) The Court stated, "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' [citation], we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." (*Id*. at p. 54.)

III. CONSTITUTIONALITY OF THE CITY'S ORDINANCE AS A TIME, PLACE AND MANNER ZONING REGULATION

Although erotic nude dancing is a form of constitutionally protected expression, (see *Barnes v. Glen Theatre, Inc*. (1991) 501 U.S. 560, 565 [nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so"]) an ordinance may limit the location of businesses offering such entertainment if the ordinance complies with constitutional requirements. Spicy, however, contends that the ordinance in this case violates the First Amendment because the City failed to carry its burden of proving that the ordinance (1) was supported by studies showing its purpose was to combat the adverse secondary effects of adult businesses and (2) allowed for a sufficient number of alternative locations for its adult business to be deemed constitutional. We disagree.

Like the ordinances in *Young* and *Renton*, the City's ordinance does not ban adult businesses altogether, but merely provides that such businesses may only be located in certain areas. It is not directed at the speech itself but at its secondary effects on the community and, for this reason, is content neutral. (See *Clark v. Community for Creative*

Non-Violence (1984) 468 U.S. 288, 293 [“restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech”].) The City’s ordinance is thus properly analyzed as a form of time, place, and manner regulation, acceptable “so long as [it was] designed to serve a substantial governmental interest and [did] not unreasonably limit alternative avenues of communication.” (*City of Renton v. Playtime Theaters, Inc., supra*, 475 U.S. at p. 47.)

A. Studies Of Secondary Effects Supporting The City’s Ordinance Regulating Adult Businesses

The City adopted its first zoning ordinance regulating adult uses in 1979. A staff report prepared in connection with the 1979 ordinance stated that the City needed an adult business zoning ordinance to deal with “potential problems” related to “sex oriented uses” “in regard to litter, traffic, parking, hours of operation, noise, congestion, public nuisance, and other matters related to the public health, safety and welfare.” The planning department staff report referred to several studies regarding secondary effects of adult entertainment uses prepared by Los Angeles County Regional Planning Commission, among others, that the City’s planning staff had relied on in recommending adoption of an adult business zoning ordinance. The staff report specifically noted these studies, their contents, and recommendations, and stated that the studies were attached to the report for the commission’s review. In referring to the studies, the staff report noted that “Most of these public agencies have adopted []regulations [of adult businesses] to protect commercial, residential, and other areas from the potential blighting or downgrading effect of adult business uses usually cause[d] by their number and proximity to each other, operational characteristics which create problems such as traffic congestion, noise, parking, increase in incidents of crime and other matters related to the public health, safety and welfare. The adverse effects caused by a concentration of adult business uses has been documented in recent studies by various agencies including the American Society of Planning Officials (Planning Advisory Report No. 327) and the L.A. County Regional Planning Commission (Adult Entertainment Study and Proposed Ordinance Amendment). Attached for the Commission’s information are the findings

which resulted from the latter study referenced above; these are generally reflective of the kinds of impacts caused by a concentration of adult businesses in the L.A. County area."

The City's report discussing the studies of the secondary effects of adult businesses on the community, as well as the studies themselves, were presented as evidence at trial and demonstrated that the ordinance's purpose was to combat secondary effects on the City from concentration of adult business uses in the City. Thus, contrary to Spicy's argument, the evidence showed that the City relied on studies of adverse secondary effects of adult businesses when adopting its ordinance in 1979 regulating such uses. This was a valid purpose, and satisfied the constitutional requirement of furthering a substantial governmental interest. A "city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" (*City of Renton v. Playtime Theaters, Inc., supra*, 475 U.S. at p. 50; see also, *City of Los Angeles v. Alameda Books, Inc*. (2002) 535 U.S. 425, 435 ["reducing crime is a substantial government interest"].)

Spicy argues, but cites no authority for the proposition and we are aware of none, that a municipality must restate the ordinance's purpose in the preamble of the ordinance. Although the City's 1979 staff report on file at the time of trial did not retain the actual studies as attachments (but they were located in a library), the lack of the attachments some 30 years later did not require the court to reject the City's evidence of reliance on those studies. It is similarly immaterial that the City did not prepare and fund its own study. A municipality may properly rely on studies performed by other jurisdictions when those studies are relevant to the problem the City's ordinance addresses. "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." (*City of Renton v. Playtime Theaters, Inc., supra*, 475 U.S. at pp. 51-52 [Renton was entitled to rely on studies of secondary effects prepared by Seattle].)

In sum, substantial evidence supports the trial court's finding that the City relied on relevant studies of the secondary effects of adult businesses when adopting its original zoning ordinance.

B. Adequate Available Sites Within the Commercial Zone

Substantial evidence supports the court's finding of fact that "Under the City's established measuring criteria," when a sensitive use is located in a "multi-tenant commercial development the edge of the 'property' occupied by the [sensitive use] is the boundary of the area leased by the [sensitive use], not the boundary of the entire parcel." Ashworth stated that during his 26-year employment in the City's planning and development department he had consistently utilized this method of measurement and no other. The evidence was undisputed that this was the method of measurement Ashworth employed when providing information to prior applicants, and when measuring the 495 feet distance between the Holiday Gentlemen's Club and the pertinent residential area. There was no evidence that the City had ever used any different method and the City's interpretation of its own zoning ordinance is entitled to deference unless clearly erroneous. (See *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193.) The 2006-2007 ordinances, passed after Spicy commenced business in the M-2 zone, provides that buffer zones are measured from the exterior wall of the adult use to the property line of the sensitive use which is, according to the evidence presented at trial, but a codification of the City's historical practice.

Whether the City's pre-2006 ordinance allowed for adequate sites for adult uses in the commercial zone is a mixed question of law and fact that we review de novo. We conclude the City carried its burden of proving that, in using its customary method of measurement noted above, there were at least 18 potential sites reasonably available for an adult business in the C-4 zone when Kwong sought to open Spicy in 2005. (*Lim v. City of Long Beach, supra,* 217 F.3d at p. 1054 [the burden of proof is on the government entity to establish its ordinance restricting speech permits adequate avenues of communication].)

The sites were: (1) two in the Morrison Building in map one area, and (2) 16 in and near the Gateway Plaza Shopping Center in map three area. Excluded as possible potential sites for an adult business were those properties that were subject to long-term leases. (*Lim v. City of Long Beach, supra*, 217 F.3d at p. 1056 [properties encumbered by long-term leases may not reasonably become available and thus should not be considered potential sites].)

Notwithstanding Spicy's suggestions to the contrary, to be properly considered a potential alternative site, the site need only be a part of the actual market for commercial enterprises generally. (See *Topanga Press, Inc. v. City of Los Angeles* (9th Cir. 1993) 989 F.2d 1524, 1531.) Provided a site is realistically available in the commercial market for a generic business, and not, for example, lacking proper infrastructure such as side-walks, roads or lighting (*ibid*.), considerations of economic viability or site suitability are irrelevant to the analysis whether such site represents a potential available location for an adult business. Thus, it matters not whether any such property was then occupied or immediately available for sale or lease (*City of Renton v. Playtime Theaters, Inc., supra*, 475 U.S. at pp. 53-54; *Diamond v. City of Taft, supra*, 215 F.3d at p. 1056), whether property owners were unwilling to rent to adult uses (see *City of National City v. Wiener* (1992) 3 Cal.4th 832, 847-848), or whether it would be too expensive or impractical to build a suitable facility. (*Ibid*.) Assuming a site is part of the relevant commercial market, and thus reasonably and realistically available, "it is not relevant whether a [] site will result in lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business. The issue is whether any site is part of an actual market for commercial enterprises generally." (*Topanga Press, Inc. v. City of Los Angeles, supra*, 989 F.2d at p. 1531.) We accordingly need not consider Spicy's arguments that property within the C-4 zone was "unavailable" in 2005 either because it was then occupied, had inadequate parking, cost too much to either build or reconfigure, or similar arguments. These matters are irrelevant to the analysis of whether an ordinance allows adequate space for adult uses. Although a city may not suppress protected speech, "neither is it compelled to act as a broker or leasing agent for those engaged in the sale of

it. [The Court will not] hold local governments responsible for the business decisions of private individuals who act for their own economic concerns without any reference to the First Amendment." (*City of National City v. Wiener, supra*, 3 Cal.4th at p. 848.)

Because Spicy would have represented only the second adult business to open in the City since 1985, the 18 potential sites within the C-4 zone represented a sufficient number of available sites to locate one adult business. We need not consider whether a different approach would be necessary if, for example, existing adult businesses severely limited the available sites once the 1,000 feet restriction between such businesses was taken into consideration. (Compare *City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1566 [given the city's small size, the ordinance's distance restriction between sensitive uses and between other adult uses provided no reasonable opportunity to open an adult book store]; *Walnut Properties, Inc. v. City of Whittier, supra,* 861 F.2d at pp. 1109-1110 [ordinance was unconstitutional because it would force the closure of the city's only adult business].) Because Spicy would have been only the second adult business to open in the City's C-4 zone, it would have had the choice of any of the 18 potential sites while also complying with the distance requirement of being at least 1,000 feet away from the only other adult business then operating in the City. (See *Isbell v. City of San Diego* (9th Cir. 2001) 258 F.3d 1108, 1114 [actual demand is one of the relevant considerations in determining whether an ordinance regulating adult businesses allows for adequate alternative sites]; *Diamond v. City of Taft, supra*, 215 F.3d at p. 1057 [because Diamond was the first person seeking to open an adult business in Taft he could choose from among all seven available sites without regard to the distance restriction between adult uses].)

In a post-trial argument, Spicy asserted that the two sites located on or near Telegraph Road, the bowling alley/restaurant and the Spires Restaurant, could no longer be considered potential sites because Ordinance No. 967 regulating land use of properties fronting the Telegraph Road Corridor adopted in 2006 prohibited adult uses in the area. Spicy supported its argument with a declaration from a person who declared that the City's code enforcement officer informed him that the ordinance prohibited adult

businesses to front Telegraph Road. The City countered with a declaration from Ashworth stating, in essence, that the code enforcement officer had misinterpreted the ordinance.

The trial court was not required to consider this new evidence presented post-trial, and neither are we. Spicy has thus forfeited the issue for review. (*Hepner v. Franchise Tax Bd*. (1997) 52 Cal.App.4th 1475, 1486 ["Points not raised in the trial court will not be considered on appeal"]; *Ernst v. Searle* (1933) 218 Cal. 233, 240-241 [it would be unfair to the opposing party and to the trial court to permit a party to change his position and adopt a new and different theory post trial].) But even if the issue was not forfeited, we find Spicy's argument lacks merit. Although the ordinance lists "conditional" and "principal permitted" uses along Telegraph Road, it does not state that only the enumerated "principal" or "conditional" commercial uses may front Telegraph Road, and no other.

C. City's Selection of the Commercial Zone as Arbitrary and Irrational

Spicy contends the City's ordinance prohibiting adult businesses from locating in the manufacturing zone and limiting them to the C-4 commercial zone makes no sense and is thus arbitrary and irrational. Spicy points out that under the ordinance an adult business could locate in the commercial zone right next door to child-oriented businesses, such as trampoline centers, bicycle shops, ice skating rinks and other types of businesses often frequented by minors. If allowed to locate in the industrial zone, Spicy argues, its adult business would be far away, not only from recognized sensitive uses, but also from the types of businesses which attract young children. For these reasons, Spicy argues that by allowing adult businesses only in the C-4 zone, the ordinance is arbitrary, irrational and furthers no legitimate City interest.

The 1979 staff report recommended that the City select the C-4 zone for location of adult businesses. The report noted that (1) the C-4 commercial zone was already the location of the three then existing adult businesses (two topless bars and a massage parlor), (2) the C-4 commercial zone was more regionally oriented allowing for heavier

types of commercial uses, and (3) the C-4 zoned areas were large enough to allow for the required buffer zones between adult businesses and sensitive uses and each other. The City followed the staff's recommendation and zoned area C-4 for adult businesses.

Although Spicy disagrees with the City's decision, the City's reasons for selecting the C-4 zone as the appropriate zone for adult uses is rational and sufficient. It is not our function to appraise the wisdom of the city's choice as it "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." (*Young v. American Mini Theatres, Inc., supra,* 427 U.S. at p. 71.)

In sum, the City's ordinance advances a substantial governmental interest and does not unreasonably limit alternative avenues of communication. Thus, the trial court correctly found that the City's ordinance was constitutional as applied to Spicy.[5]

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

BAUER, J.*

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[5] Because we find that the pre-2006 ordinance was constitutional, we need not decide whether Spicy could have been considered a legal nonconforming use under the ordinance had it instead been unconstitutional.

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.